

Grinnell Corporation and Jesse N. Harper. Case 4-
CA-22283

February 8, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On August 10, 1995, Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and an answering brief in response to the Respondent's exceptions. The Respondent also filed a reply brief and an answering brief in response to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative judge and orders that the Respondent, Grinnell Corporation, Wilmington, Delaware, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

David Faye, Esq., for the General Counsel.
Thomas J. Bender Jr., Esq. (Saul, Ewing, Resnick & Saul),
of Philadelphia, Pennsylvania, for the Respondent.

DECISION

WILLIAM F. JACOBS, Administrative Law Judge. This case was heard in Philadelphia, Pennsylvania, on September 21 and 22, 1994. The charge was filed by Jesse N. Harper, an individual, on November 22, 1993, and amended on December 23, 1993. Complaint issued March 15, 1994, alleging that Grinnell Corporation (Respondent, Employer, or Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act by laying off Jesse N. Harper on two occasions because of his union activities on behalf of the Road Sprinkler Fitters Local Union No. 669, UA (the Union), and violated Section 8(a)(1) by telling an employee that the employee would not be recalled from layoff because the employee had engaged in union activities, by threatening an employee with

discharge if the employee sought assistance from the Union or filed grievances concerning his earlier layoffs, and by telling an employee that the employee would never work for Respondent again if the employee "went" to the Board. Respondent denies the commission of any unfair labor practices.

All parties were represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. The General Counsel and Respondent filed briefs. On the entire record,¹ my observation of the demeanor of the witnesses and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT²

Background

Respondent is a Delaware corporation which has at all relevant times been engaged in the design, fabrication, and installation of fire protection systems and sprinkler piping. The number of employees in its work force has, through the years, fluctuated. Employees are laid off, recalled, and laid off again depending on the work available. This is a problem suffered throughout the industry. Respondent's collective-bargaining agreement with the Union permits it to hire and lay off in accordance with its own estimation of the qualifications of the particular employees involved.

During the period of time relevant to this case, Harry Dumas held the position of construction superintendent in the Wilmington, Delaware district. As superintendent, Dumas was in charge of all construction. That included estimating the jobs, scheduling, providing for the delivery of tools and materials to the jobsites, and staffing the jobs with crews. As Dumas testified, he basically ran the jobs and told the employees on the jobs what to do.

The type of jobs managed by Dumas involved the installation of piping and sprinklers, both new construction and retrofits. There were also some emergency service repairs and corrections required. The different types of jobs required different skills. New construction required basically the installation of pipe in accordance with blueprints drawn to the specifications designed by Respondent's engineering department. Emergency service and repair work had to be performed by employees with a little more knowledge of sprinkler systems, employees who knew how the various valves and pumps worked and how to repair them.

Dumas chose how many employees would work on a particular job and who those employees would be. Thus, he chose to hire, layoff, fire, and transfer employees depending on the requirements of the jobs, the particular skills of employees available, and his knowledge of their past performances. Occasionally, Dumas would hire an applicant based on the Union's recommendation.

During the last few years, the relevant period here, the work force consisted of a core of about 20 employees which included working foremen, journeymen, and apprentices. An-

¹ General Counsel's motion to correct the transcript, dated November 9, 1994, unopposed, is granted. Corrections agreed on by the parties as reflected in Respondent's response dated November 17, 1994, are approved.

² Jurisdiction and the status of the Union as a labor organization are admitted.

other 10 were hired to supplement the 20 core employees on an as-needed basis.

Jesse Harper—Employment History

Jesse Harper, the alleged discriminatee in the instant case, was first hired as a journeyman sprinkler fitter by Respondent in July 1981. He was laid off in November 1981 for lack of work. He was hired a second time in May 1982 and laid off in April 1983, again for lack of work.

Between 1983 and 1989, Harper worked for other companies or was on disability due to an accident. Although he tried to get work with Respondent during this period, he was unsuccessful. In 1989, however, Respondent needed additional employees. Dumas, on that occasion, called John Garthe, business agent for the Union, and asked him if he had any members out of work. Garthe mentioned Harper and inasmuch as Dumas knew Harper and considered him one of the irregular swing group that worked for Respondent on an occasional basis, he agreed to hire him once again. From previous observation, Dumas had noted that Harper was a good employee with a good attendance record so he put Harper to work as of June 1989.

In February 1990, Harper was working for Respondent as a foreman when Dumas advised him that there was a layoff coming up. Since Harper and Dumas were in disagreement about certain jobs, at the time, Harper told Dumas to put him at the top of the layoff list and he would take a voluntary layoff. Dumas agreed and Harper quickly found employment elsewhere.

In May 1992, Harper was out of work. Despite his earlier differences with Dumas, he decided once again to seek employment with Respondent. There were no other jobs available and Harper preferred to work for Respondent because it was close to his home. He applied and was hired once again.

Throughout his employment history with Respondent, Harper was a member of the Union which represented Respondent's rank-and-file employees. As an employee he was considered a good one. He was conscientious, did what he was told to do, never missed a day's work, and was always on time.

The Organization of Stong, Inc. Employees

In late October 1992,³ Respondent had a project at the DuPont Hotel in Wilmington installing sprinkler systems. At the same time, Joseph Stong, Inc. also had projects in progress at the same site. Stong did various types of contracting including sprinkler installation and was therefore a competitor of Respondent.

About this time, certain of Stong's employees became dissatisfied with working conditions as they existed under their nonunion employer. Their concerns involved wage rates and the failure of Stong to grant increases during the previous 2 years and to pay promised bonuses. As a result of their dissatisfaction, some of Stong's employees sought out union members employed by other contractors working at the site, in order to inquire about union membership. These included employees of Respondent as well as other union contractors.

Perhaps the first contact made by Stong employees occurred when Graig Bourgeois and Matthew Gravey ap-

proached Harper during lunch hour at the DuPont Hotel worksite and advised him that they were interested in organizing Stong's employees. They asked him how to go about it and whom to contact. They asked him about collective bargaining, how it works and what benefits could be derived from it. They provided Harper with their names and phone numbers and he promised to have a union representative contact them.

Harper was later approached by other Stong employees and asked about the Union but he refused to talk to them on working time. Rather, he directed them to meet him at lunchtime out at the mall or during breaktime.

In addition to Harper, Bourgeois and Garvey also spoke with Chris Walker, another of Respondent's employees. When they told him that they were interested in joining the Union, Walker encouraged them by explaining to them the benefits of unionization and suggested that they sign authorization cards. He did not supply cards to them, however.

Meanwhile, there were other contacts between the two groups of employees. Stong employee Patrick MacCrory spoke to each of Respondent's employees both on the day shift and the night shift about the benefits of joining the Union. He talked with Respondent employees Harry Gravell, Dave Walls, Wally Greer, Jesse Harper, and others. He talked to Harper extensively because Harper was experienced, had been involved in an organizing campaign years before while employed by another employer, and MacCrory did not fully understand the procedure to follow. Somewhat later, MacCrory talked with Harry Gravell, mostly about scheduling meetings and about who was who in the Union. But since Gravell was not steadily employed at the DuPont Hotel jobsite, MacCrory initially could talk with him only occasionally when he was visiting the site or just driving by. When MacCrory talked to Walls and Greer, it was again about benefits and they both encouraged him to join the Union.

After his initial contact with Bourgeois and Garvey, Harper contacted John Garthe, a business agent with the Union. He told Garthe that certain Stong employees, in their sprinkler division, were interested in organizing. He supplied Garthe with the names and telephone numbers of Bourgeois and Garvey. Garthe told Harper that organizing Stong's employees was a good idea and that he should contact Marvin Martin, the Union's organizer, about their interest.

Harper also spoke with Harry Gravell about the same time, one afternoon after work, at the jobsite. Gravell, in addition to being a foreman for Respondent, was also a tutor proctor for the Union. Harper told Gravell about Bourgeois and Garvey and their interest in the Union, and supplied him with their phone numbers. He asked Gravell if he thought organizing Stong was a good idea and Gravell agreed that it was. Gravell told Harper that he would follow up on the matter and talk to him later.

After talking with Garthe and Gravell, still in October, Harper visited Respondent's office to pick up his paycheck. There, he happened to meet Gravell again. Dumas and Jim Schwander,⁴ contract sales and office manager, were also there. Schwander was Dumas' immediate supervisor. Harper mentioned to the others that Stong employees had come to

³ Hereinafter, all dates are in 1992 unless indicated otherwise.

⁴ Schwander is an admitted supervisor and agent of Respondent as defined in Sec. 2(11) and (13) of the Act.

him and advised him that they were interested in organizing and in joining the Union. He told them that he had discussed these contacts with Garthe and that he thought it was a good idea. Schwander, Dumas, and Gravell all agreed that since Stong was a nonunion competitor of Respondent and, as such, was hurting Respondent's business, it would be a good idea to get that company organized. Schwander and Dumas both gave their blessings and said that it would be all right to pursue the organizational efforts at Stong. Gravell said that he would contact Marvin Martin and John Garthe in pursuance of the decision to organize Stong but could not personally get further involved because of his other duties.

Toward the end of October, Bourgeois contacted Gravell and a union organizing meeting was scheduled for November 3. Gravell ran the meeting. He explained to those present what was involved in a union organizing campaign and what they would have to do. The Stong employees asked questions, after which they decided that they were all in favor of joining the Union. Gravell then stated that he would be turning over the organizing campaign to Marvin Martin whose job it was to organize.

After the first union meeting, over the next few days, those Stong employees who had attended, MacCrory, Garvey, Bourgeois, Michael Mills, and Steven Mecouch contacted fellow employees of Stong by phone to invite them to a second union meeting scheduled by Gravell for November 9. At the same time, Grinnell employees continued to converse with various Stong employees concerning union membership and benefits. Harper continued to "talk up" the Union but so did other employees of Respondent to the same extent.

At the November 9 meeting, Martin had building trade organizers and representatives from five locals attend including those from plumber and pipefitter locals in the Delaware Valley. They helped conduct the meeting. Gravell was there but did not address the Stong employees. Harper and other employees of Respondent attended as well as about 25 Stong employees.

At the meeting, Martin enlisted the support of the Grinnell employees in the Unions' organizing drive at Stong, Inc. He asked them to talk to the Stong employees about their union pension and their union health and welfare plans and to show them their check stubs. They were expected to continue their support throughout the entire campaign which was to continue through the following January.

The third union meeting was held on November 16. Bourgeois attended that meeting and signed a union authorization card while there. He also attended additional union meetings and testified with regard to them that Gravell attended a couple of them and may have spoken at some of them. Neither Harper nor any of Respondent's other employees attended any of these later union organizational meetings, according to Bourgeois.

Throughout the end of November and December, both Respondent and Stong continued to employ workers at the DuPont worksite. Jesse Harper was the only Grinnell regular employee, however. Wally Greer and David Walls were also there, Greer for only a relatively short period of time. Other employees worked there on an as-needed basis.

In accordance with Respondent's plan and Marvin Martin's request, these employees were expected to continue to talk to the Stong employees about the benefits of union

membership. According to Dumas, Harper, Greer, and Walls all told him that they were continuing to talk to Stong employees in support of the organizing campaign. However, Walls testified that neither he nor Greer was so engaged.⁵

On December 7, the Union held a meeting at the Hilton Hotel in Wilmington, Delaware. This meeting was attended by about 50 people. Marvin Martin ran the meeting and addressed those present. As part of the program, Martin discussed how the membership could help the Union organize contractors.

After the meeting, Harper approached Martin and asked him if the Building Trades were involved in organizing Stong. Harper, in his organizing efforts, had been concentrating on Stong's sprinkler fitters and not the other trades. Martin informed him that now, the Building Trades were involved in the union organizing campaign and the game plan had changed. He said that his organizing committee at Stong had told him that the Building Trades could organize all of Stong's craft divisions if they could just convince one key employee of Stong to join in the effort. He identified that key employee as Jeff Bowersox, Stong's lead plumber. He told Harper that he would appreciate it if Harper would approach Bowersox, show him his pay stub, talk to him about his pension plan and insurance, and encourage him to get involved in the organizing effort.

Harper, in reply, suggested that Martin get the plumbing organizer to talk to Bowersox because he, Harper, was not in favor of the broader organizing effort and because he was afraid of losing his job. He explained to Martin that he had been told that Bowersox was antiunion and warned that he should stay away from him.

Despite Harper's protestations, Martin insisted that Harper speak to Bowersox and use his personal influence to obtain his cooperation. He tried to assure Harper that he would not lose his job. Finally, Harper agreed to talk to Bowersox provided it was all right with Dumas.

According to both Martin and Harper, Dumas was present at the December 7 union meeting and Martin testified that Dumas was supportive.⁶ After Harper agreed to talk to Bowersox, if Dumas said it was all right, he went over to Dumas and brought him back to join in his conversation with Martin. He then told Martin that he wanted him to clear with Dumas, his plan to have Harper contact Bowersox and enlist him in the organizing campaign. Martin did so, and Dumas agreed that it would be all right for Harper to talk with Bowersox for the purpose of organizing Stong. Harper asked Dumas specifically if he was going to lose his job if he talked to Bowersox and Dumas assured him that he would not.⁷

Sometime after the December 7 meeting, Harper began speaking to Bowersox at the DuPont Hotel jobsite in Wilmington. They had several conversations, over a period of time extending into late December, during which Harper described the benefits of belonging to a union and tried to convince Bowersox to join. He told Bowersox that it would be a good idea if Stong went union. Bowersox told Harper that he was not interested, that he was better off the way he was,

⁵ On this point, I credit Walls over Dumas.

⁶ Dumas testified that he did not attend the December 7 meeting, but I credit Harper and Martin.

⁷ Dumas specifically denied that this conversation ever took place. His denial is not credited.

as a nonunion employee. Harper testified that he only spoke to Bowersox during lunch hours, never during working time. Bowersox testified that he never felt harassed by Harper and never was upset or angry with him for discussing unionization of Stong. Harper was the only Grinnell employee to discuss the Union with Bowersox.

After several of Harper's union conversations with Bowersox, probably in late December, the latter repeated some of Harper's remarks to several of Stong's other employees including to Bubba Forshey, supervisor of the sprinkler fitters who had the title of fire protection field superintendent. Bowersox told Forshey that there was a pipefitter down at the DuPont job that was telling him how great the Union was and how great it would be if all of Stong's employees went Union. According to Forshey, Bowersox told him that the employee he was talking about had been bothering him about organizing and going Union; that he had been talking about the Union all the time, on the job, during working hours, frequently in the material storage area shared by the employees of both Respondent and Stong; and that he had been harassing him constantly.⁸ Forshey asked Bowersox who the employee was that he was talking about but Bowersox could only identify him by his first name, Jesse. Forshey then commented that it was not allowed on the DuPont site to talk, pro or con, about unions and then added that he would take care of it.

The day after Forshey obtained the information about Harper's organizing activity from Bowersox, he spoke with Duke Yankalunas, Stong's project manager on the DuPont job. He told Yankalunas that Respondent's employees had been talking to Stong's employees and trying to organize them. Yankalunas informed Forshey that he would make a phone call and would "get this thing squared away."

Yankalunas, at this point, called Jack Stepchuck, contract administrator for DuPont, at the project. He told Stepchuck that Stong was having a problem at the hotel jobsite with certain of its employees who were trying to organize and that one of Respondent's mechanics had contacted them with regard to their possibly joining the Union. He said that there had to be a resolution of the problem, then let Forshey talk to Stepchuck. Forshey then told Stepchuck that somebody by the name of Jesse⁹ had been "confronting" one of his men on the jobsite. Stepchuck promised "to take care" of the problem, that he would call Respondent and talk to Dumas.

Stepchuck testified, in replying to a number of leading questions, that Yankalunas indicated that the conversations between Respondent's organizing employees and the Stong employees were going on during working hours and that this fact was his main concern because it disrupted the workday.

Stepchuck testified that 5 minutes after his discussion with Yankalunas, he phoned Dumas. He told Dumas that Yankalunas had called and complained that one of the Grinnell employees was interfering with Stong employees' ability to do their work by constantly talking to them and

bothering them about joining the Union. He advised Dumas that Stong was somewhat upset about it, and urged, "We need to get the situation corrected." Both Stepchuck and Dumas testified that the Grinnell employee involved was not mentioned by name. Stepchuck did not volunteer the name and Dumas did not ask for it. Dumas testified that he had no reason to believe that any specific employee was involved and that Stepchuck did not say that he wanted anyone removed from the job. Stepchuck also testified that he did not ask Dumas to have any individual Grinnell employee removed from the DuPont worksite. Despite the testimony that no names were mentioned, Dumas promised Stepchuck that he would take care of the problem right away. Though Dumas admittedly promised Stepchuck, "I'll take care of it," he nevertheless denied that he ever removed anyone from that job as a result of this conversation with Stepchuck.

Dumas testified that as a result of his conversation with Stepchuck, he talked to the individuals who were on the DuPont job, Greer, Harper, and Walls. He told them that they had a job to do for Grinnell, to concentrate on performing their duties during working hours and not to spend time away from that job. According to Dumas he told them that if they wanted to do something on their own time, during their lunch period, breaktimes, or after work, he had no problem with that, but that during working hours, he expected them to be working for Respondent and not talking with everyone else.

Stepchuck was not the only member of DuPont management with whom Dumas spoke concerning the campaign to organize Stong's employees. Within a week of that conversation, Dumas had a discussion with Bob Frawnapple, DuPont's contact with Grinnell's employees at the jobsite. Frawnapple asked Dumas what he knew about Respondent's trying to organize Stong. Dumas denied that Grinnell was trying to organize Stong. He told Frawnapple that the campaign was initiated by Stong's own employees who wanted representation from the building trades. According to Dumas, he denied that Respondent had anything to do with the organizing effort and did not mention that its employees were involved. Dumas also testified that Frawnapple did not complain about any particular one of Grinnell's employees' involvement. Frawnapple did not testify.

Meanwhile, about this time, at the jobsite, Frawnapple also became engaged in conversation with David Walls, one of Respondent's foremen on the job. Frawnapple, according to Walls, told him that Respondent's employees were to stay in their own work areas. He explained that a few problems had arisen involving Jesse Harper and he wanted to make sure that the problems were taken care of. He said that he did not want Harper talking with Stong's other trades, trying to unionize them and that if Respondent's employees were going to work in specific areas, Walls should notify him in advance and set it up with him.

After his discussion with Frawnapple, Walls told Harper to stay in his work area and not to be going out and talking to the other trades and holding them up.

Harry Gravell testified that in late December he had a conversation with Dumas during which Dumas told him that representatives of Stong had lodged a complaint with DuPont that Grinnell employees were trying to organize Stong's employees and that Stong wanted the person responsible for the organizing campaign, Jesse Harper, removed from the job

⁸ Where discrepancies appear in the record as to the times, places, and style of Harper's campaigning, I credit his and Bowersox's testimony over that of Forshey. I do not believe Forshey's account of what Bowersox told him about his discussions with Harper.

⁹ Stepchuck denied that anyone mentioned Harper's name during his telephone conversation on this occasion. He testified that he could not recall talking to Forshey. Where the testimony of Stepchuck and Forshey are in conflict, I credit Forshey.

and that DuPont was making the same request of Grinnell. Dumas then informed Gravell that he was going to transfer Harper.

Gravell also testified that, prior to this conversation with Dumas, he had reluctantly been involved in the organizing of Stong employees. He explained that he would receive phone calls from Stong employees concerning the organizing campaign and he met with them on at least three occasions, twice at different hotels and once at Pipe Fitter's Local 420 union hall in Philadelphia. Since Gravell only visited the DuPont project occasionally, he did not speak with them much, if at all, while on the job, but did talk to them at breaktime and after work.

When examined concerning his late December conversation with Gravell about the forthcoming transfer of Harper, Dumas testified that he could not recall such a conversation. He explained that, at any rate, he would not have told Gravell that DuPont or Stong had complained about Jesse Harper, because he had not known which employees they had complained about. He testified that the complaint had been vague and general and that he never did find out which of the Grinnell employees had been the subject of the complaint. He testified that if he had known, at the time, that it was Harper who had been talking to Stong employees, during working time, and disrupting the work schedule, Harper would have been reprimanded and removed from the job.

On the morning of January 4, 1993,¹⁰ Walls, as foreman in charge,¹¹ called a meeting with Wally Greer, who was there for just that day, and Jesse Harper. He told them that he had a message from Dumas that there was to be no talking to Stong employees on the job, on companytime. Greer, also a foreman, though not in charge of the job in progress, repeated Walls' words, apparently for Harper's benefit. Harper agreed not to talk with Stong employees. At the end of the brief meeting, Walls and Greer invited Harper to join them for lunch, scheduled as per usual, at the 9:30 a.m. break. The three then separated and went to their workstations.

Later that morning, Harper was working by himself on the fifth floor of the building when, about 9:30 a.m., Greer came to get him to go to lunch. They were walking together to get coffee for lunch and conversing when Greer advised Harper that if he continued to engage in union activity, he could lose his job. Harper replied that he was not in there organizing by himself, that Dumas, Garthe, and Martin all knew what was going on.

Before actually going to lunch that morning, Walls, Greer, and Harper went to the change room, also considered Stong's shop room or supply room. Pat MacCrory, one of Stong's foremen, was in the room when they entered. He was upset. Harper asked him what the problem was. MacCrory replied that he was upset about his men getting laid off due to being involved in union organizing activities. Harper told MacCrory to calm down, that he would see to it that they got legal assistance. He advised MacCrory to get his men down to the Labor Board. MacCrory answered that he did not want to hear about it.

According to Walls, he did not hear much of the discussion between MacCrory and Harper and did not report on it to Dumas. Walls testified that he did not report on any of the union campaign to Dumas.

After lunch, Harper called home to check on an appointment and was informed that his daughter had been rushed to the hospital. He left the jobsite immediately after obtaining permission from Walls, and did not return for the rest of the day.

On the afternoon of January 4, Dumas advised Walls that he was transferring Harper to another job. Walls testified that he assumed that Harper was being transferred because Dumas needed him on another job and the DuPont job was at the stage that one man, working a day here and a day there, could finish the job himself, so that Harper could be spared. The job was essentially caught up.

Dumas testified that he did, in fact, transfer Harper from the DuPont job on January 4 because the actual amount of work was decreasing on that job. The job was winding down and the need for manpower was not enough to keep three men working. For that reason, Dumas decided to send Harper to another job the following week.

According to Dumas, he had already decided to transfer Harper to another job, rather than lay him off, before he called Walls to let him know that he was taking Harper off the DuPont job. Since Greer was scheduled to leave the DuPont job on January 4 along with Harper, that would leave just Walls to both run the job and to do what work there was left to do.

Dumas testified that the way manual labor was being divided on the DuPont job, at the time that he removed Harper, was to have each man, including Walls, perform an equal amount. Since the job was at a point where one man could keep up with the rest of the installation, leaving Walls as the only man on the job was considered the most economic way of handling the situation.

During his examination, Dumas was questioned as to whether he would have removed Harper from the DuPont job because of his helping to organize the Stong employees. Dumas denied that he would have done so because, as he explained, it was to Respondent's benefit to have Stong organized. If Stong were organized, "it would have put the labor costs at an even keel and made both companies more competitive with each other." Dumas specifically denied removing Harper from the DuPont job because of his organizing activities.

Dumas was also briefly examined with regard to the conversation between Harper and MacCrory which had taken place during the lunchbreak on January 4. Dumas referred to this incident as the "blowout." He admitted that news of the blowout had gotten back to his office and that there was some kind of problem. He could not recall whether it was Walls or Greer who told him about it, but both had been present during the incident. Dumas said that he investigated the matter, found no evidence of anything, and essentially took no action.

On the afternoon of January 4, Dumas testified, he called Harper at the jobsite to discuss with him the blowout and to let him know about his transfer. However, Harper had already left because of the emergency involving his daughter so Dumas called him at home that evening.

¹⁰ Hereinafter, all dates are in 1993 unless indicated otherwise.

¹¹ Walls coordinated the job for Respondent. He attended job meetings and assigned tasks to fitters and apprentices. These assignments were taken as orders. I find that Walls was the supervisor on this job, as defined by the Act.

According to the credited testimony of Harper,¹² when he received Dumas' call, Dumas told him that he had spoken with Walls and Greer and had heard from them that Harper had had a big blowout with a Stong employee in violation of his "no-talking" order and he was removing Harper from the DuPont jobsite. Harper did not consider his discussion with MacCrory earlier that day to be a blowout, and tried to tell Dumas so. Dumas, however, would not listen. Harper then asked Dumas if his removal from the DuPont job meant that he was being laid off. Dumas replied that Harper was not going to be laid off but would be transferred to the Raychem job in Pencader Industrial Park in Delaware.

On January 5, Harper reported to Raychem. MacCrory, back at the DuPont jobsite, first thing in the morning, asked Walls where Harper was. Walls replied that Stong had called DuPont and DuPont had Harper removed, apparently meaning through Respondent.

On January 6, Dumas visited the Raychem jobsite and engaged Harper in conversation. He advised Harper that he was being laid off for lack of work. Harper told Dumas that he believed that he was being laid off because of his union activity and the hiring of his replacement, Steve Mecouch. Dumas denied Harper's accusation. Dumas testified that lack of work was the true reason for Harper's layoff and that his union activity had nothing to do with it.

As of January 6, Respondent employed two employees on the Raychem job, Harper and his foreman, George Snyder. When Harper was laid off on that date, Snyder remained the only employee. I find that Harper's layoff from Raychem legitimate and not unlawfully motivated.

After his layoff on January 6, Harper called Garthe and told him that he had been laid off and had been singled out for layoff because of his attempts to organize the Stong company and perhaps because of the blowout or confrontation with MacCrory on January 4 which he blamed on Walls' and Greer's reporting to Dumas. During this conversation, or another one in January after his layoff, Harper spoke with Garthe, and later with Martin, about Mecouch being hired by Respondent. He asked them why they were bringing new men into the Union at a time when there was so much unemployment. Garthe explained that they were trying to help out the Stong employees who had been laid off or discharged as a result of the organizing campaign. Harper told Garthe that he disagreed with this procedure.

During this discussion with Garthe, Harper stated that he was considering filing a grievance over his layoff. Garthe, however, attempted to dissuade him from doing so on grounds that there were not enough facts to support the filing of a grievance against Respondent. He offered, however, to speak with Dumas to see if he could remedy Harper's problem and get him recalled. This he eventually did. He also promised to talk to Dumas about his agreement with Martin to hire laid-off and discharged employees of Stong.

Following the transfer of Harper out of the DuPont project, Stepchuck called Yankalunas to ask him if the situation that they had talked about initially had been corrected there. Yankalunas replied that the situation had been corrected, that the mechanic (Harper), was no longer working in

the facility. Stepchuck testified that he made his followup call "roughly two days after the incident occurred."

Despite the testimony of Dumas and Walls that there was only enough work left at the DuPont jobsite to keep one man busy, Harper was immediately replaced by Gravell. Gravell worked there for the next 3 or 4 days along with Walls. Gravell had heard that Harper had been removed from the jobsite because he had been talking union to Stong employees, so he decided to avoid any similar conduct which might result in his own removal. He understood that DuPont was a big customer of Respondent and he did not want to do anything that would interfere with their good relationship. Nevertheless, Gravell continued his organizing efforts, though not during working hours, and these efforts were known to Dumas and probably to Stong's supervisors, according to Gravell. He testified that he received no complaints about his union activities and, in fact, Dumas was still supportive of the effort because it would have been financially beneficial to Respondent to have Stong organized.

Two days after Harper's layoff, three other employees were laid off by Respondent, two journeymen and an apprentice journeyman. One of the journeymen was recalled shortly after his layoff. None of these three employees were laid off for any reason other than lack of work.

Following the initiation of the Union's campaign to organize Stong, a number of Stong's employees were laid off and/or discharged, allegedly¹³ because of their union activity. Marvin Martin requested Dumas to hire some of the former Stong employees to support the organizing effort. John Garthe made the same request. As a result, Respondent hired, among others, one Steven Mecouch on December 8, 1992, following his alleged unlawful layoff on November 20, 1992.¹⁴ Mecouch was hired as an apprentice to help Charles Walls out, to lend credibility to the Union, and to help benefit Respondent financially by permitting Mecouch to work for Respondent at the lower wage of apprentice. Dumas testified that both apprentices and journeymen do similar work. They both assist the foreman install pipe in the usual two-man crew used by Respondent. He stated that it is more advantageous to use an apprentice rather than a journeyman to assist a foreman because the difference between their abilities is minimal while the apprentice works at a lower wage rate than a journeyman.

Following his layoff, Harper talked with Martin about the Mecouch issue. He asked Martin why he was bringing new men into the Union at a time when there was so much unemployment. Martin explained that he had to help out the men who got hurt in the organizing campaign at Stong. Harper believed that Mecouch had been hired about the same time he was laid off although not to work either at the hotel or at Raychem. Since Dumas admitted that it was possible that Mecouch was hired around January 4, 1993, it may be that Mecouch was hired on December 8, as he testified elsewhere, then laid off, then rehired. However, the record is unclear as to these dates. In any case, Harper maintains that Mecouch should not have been working while he was in lay-off status.

¹² Where the testimony of Dumas concerning the content of this conversation differs from that of Harper, it is not credited.

¹³ A settlement agreement in the Stong case contains a nonadmissions clause.

¹⁴ Mecouch's layoff was followed on December 14, 1992, by an alleged unlawful discharge.

Dumas recalled Harper to work on February 22. According to Harper, he had a conversation with Dumas at 7:30 a.m. when he reported to the shop office. He testified that Dumas was upset at his attempting to organize Stong and chastised him for it. Harper reminded Dumas that his position was contrary to his earlier position. Dumas stated that he knew Stong and he did not care how he treated his employees, that it was none of Respondent's business. Harper replied that John Garthe and the Union did not feel that way about it. Dumas then said that he did not want to hear another word about it and Harper promised not to engage in any more union activity since it had already cost him his job.¹⁵

Dumas testified that he called Harper and other employees back to work on February 22 because Respondent experienced an upswing in the workload and more manpower was needed. He denied that Garthe had asked him to recall Harper and also denied that the conversation described by Harper took place that morning.¹⁶ Indeed, Dumas stated that, at the time, he was still anxious for Stong to be organized and was in favor of the effort.

The organizational campaign at Stong continued throughout February. Martin filed a petition for an election on March 12.

On April 5, the Regional Director approved a Stipulated Election Agreement providing for a representational election at Stong to take place on May 13. The petitioning unions lost the election but filed objections on May 20. Thus, the campaign to organize Stong continued. Harper, however, was no longer involved. His notes do not indicate that he did any more work at the DuPont Hotel. Nor do they reflect whether or not he worked at any locations where Stong employees were also employed.

According to Harper, on May 7 he was working with Greer at the West Company jobsite at Lionville, Pennsylvania. Greer advised him on that date that there was going to be a layoff but that he was safe because Respondent had to keep the politicians happy. Harper interpreted Greer's remarks as referring to the internal union elections which were going on at the time and in particular to John Garthe, who was running for business agent. Harper testified that Garthe had been instrumental in getting him his job back and, at the time of the conversation with Greer, he was engaged in campaigning on behalf of Garthe. He further interpreted Greer's remarks as inferring that he would not be laid off with the other employees because of his political connection to Garthe. That day, Respondent laid off two employees, both journeymen, then on May 14 laid off six more, five journeymen and one apprentice while Harper was retained. Neither Garthe nor Greer testified with regard to this issue. Dumas testified that although he was aware that an internal union election was ongoing at the time, no one asked him to keep Harper on the job because of it, neither Martin nor Garthe.

On June 8, Respondent laid off three employees for lack of work, two journeymen and Harper. A few days before the actual layoff, another company, Magic Fire Protection, somehow heard of the forthcoming layoff and asked Dumas for the names of the employees who were going to be laid off. Dumas told the caller that all of the men were pretty good guys and provided the names of Phil and Ralph Leonard,

Duncan, and Harper. Ralph Leonard had been laid off on May 14. The representative of Magic asked Dumas to have the two Leonards call whenever they were laid off, because there was a job available for them and they could ride together. The caller did not seem to be interested in Harper. Originally, Dumas told the three laid-off employees to take only 3 days off, the rest of the week, and to report in on Monday, June 14, at the shop for reassignment. He explained that the job had been bid so tightly that he could not afford to keep the men on the job. Despite Dumas' explanation, Harper still felt that he was being singled out for layoff because of his union activity.

On June 14, Duncan, Phil Leonard, and Harper reported to the shop but the few big jobs that Dumas had expected to break did not, and there was no work. Dumas told the three that he was going to let them go, that there was no work, and to report to the shop the following week. He told Leonard to call Magic Fire Protection for employment. He subsequently did so, and was hired.

According to Harper, he asked Dumas if he would contact Respondent's Columbia, Maryland office on his behalf but Dumas declined to do so. Dumas could not recall Harper marking this request but stated that he had no connections at the Columbia office anyway, that Gravell would have been the one to make such a call.

After the layoff of June 14, Harper went to Garthe and asked to file a grievance based on his layoff for engaging in union activity. Garthe told Harper that he would talk with Dumas, that he would like another chance at clearing the situation up, so Harper did not file the grievance. When Garthe called Dumas, he was told that Harper's layoff had nothing to do with his organizing at Stong's, that there had been a reduction in force, and that other employees had been laid off as well as Harper. Garthe was satisfied with Dumas' explanation.

After the June 14 notice that the June 8 layoffs were to be extended, Harper called Dumas once or twice each week, thereafter. He called about every Monday throughout the summer and appeared personally at the shop the first three or four Mondays after the layoff seeking employment, but each time was advised to check back. Although Harper told Dumas that he was having financial problems and needed a job, he was not offered employment. Harper also searched elsewhere for employment and checked with the unemployment office without success.

Meanwhile, at Respondent's shop, George Snyder, a foreman who had been initially laid off on June 11, was sent on June 15 to Respondent's office in Avenel, New Jersey. Snyder had been chosen for layoff rather than someone else because he had made known his intention to start his own business and Dumas decided to save the slot for someone who intended to stay with the Company. Toward the end of the month, Duncan was recalled.¹⁷

On July 19 and again on July 22, Harper called Garthe¹⁸ to seek his help in getting recalled and most likely to further discuss, once again, the possibility of filing a grievance. As a result of these calls Garthe again called Dumas and suc-

¹⁵ Harper's testimony concerning this conversation is credited.

¹⁶ Dumas' denial is not credited.

¹⁷ There is no explanation in the record why Duncan was chosen over Harper for recall.

¹⁸ See Harper's weekly planner.

ceeded, at least he thought, in getting Dumas' agreement to recall Harper.

On July 29, Harper attended a union meeting in Frederick, Maryland, where he spoke to Garthe and Martin about his problems with Respondent. They told him that they had spoken with Dumas about his problems and he should go to the shop.

Throughout the summer, according to Dumas, there were rumors flying that Harper was claiming that he had been laid off because of his union activities and that lawsuits, National Labor Relations Board (NLRB) litigation, and grievances were about to be filed. While these rumors were floating, Harper was still calling periodically to ask about employment. Several times during the summer, Dumas confronted Harper about the rumors, asking him if, in fact, there was some kind of litigation pending and, if so, what form it would take. Each time Harper would deny that there was any truth to the rumors that litigation was contemplated. He did admit to Dumas, however, that he felt that he had been removed from his job because of his union activities and complained that Mecouch had his job.

Despite Dumas' testimony that he heard about Harper's intention of filing a grievance only through rumor, it is clear that he also heard about it directly from Garthe when Garthe called him about recalling Harper to work. For reasons already stated, neither Dumas nor the Union welcome a grievance at this time.

On August 2, Harper visited the shop, as instructed on July 29 by Garthe and Martin, but Dumas was not there. Harper was under the impression that his problems had been resolved and that he was supposed to talk to Dumas about employment again. While Harper waited for Dumas at the shop, Dumas called in and spoke with Gravell to dispatch work through him. When Harper asked Gravell if he could speak to Dumas on the phone, Gravell said that Dumas did not have time for him then, to check back later.

Harper's weekly planner contains notes indicating probable additional contacts with Garthe on August 2, 9, and 14 and Dumas on August 9. There is, however, no testimony concerning these contacts.

At 7 a.m. on August 16, Harper met and had a conversation with Dumas in front of the shop.¹⁹ According to Harper's credited testimony, he asked Dumas if he had a job for him and pointedly asked him how Mecouch, his "replacement apprentice" was making out. Dumas replied that Mecouch was doing a fine job. The two next talked about the union organizing campaign at Stong's and Dumas offered an opinion that organizing was outdated and ineffective, comparing it with a Sherman tank chasing a stealth bomber. Harper testified that Dumas then said that he "was an example of how you can lose that good paying union job for participating in union activity." About helping Harper get a job, Harper testified that Dumas said, "The horse was out of the barn"; that there was nothing he could do to help Harper at that time. Dumas told Harper to check back. According to Harper, Dumas did not explain what he meant by the expression, "the horse was out of the barn" and he did not ask. He did feel, however, that Dumas meant that he was not

going to hire Harper back and that he would have to look elsewhere for work.

With regard to the August 16 conversation between Harper and himself, Dumas testified that he never told Harper that he "was an example of how you could lose a good-paying union job by participating in union activity" and never said anything like "the horse is out of the barn" which he denied was one of his expressions.²⁰

After his August 16 conversation with Dumas, probably on August 23 and 24,²¹ Harper apparently met with or called Garthe and reported its content to him. Evidently he again suggested that he should file a grievance but Garthe once more talked him out of it. Garthe said he would, once again, talk to Dumas on Harper's behalf.

Meanwhile, Harper concluded that Garthe was proving ineffective in getting him recalled and decided to seek additional help from someone higher up in the Union. The name of John Lundak Jr., business manager for the Union, appears for the first time in Harper's weekly planner on August 20. On August 31, the planner notes that he called Lundak and had a meeting scheduled for 1 p.m., September 2, but that Lundak did not make an appearance.

Harper's weekly planner for dates, September 6, 7, and 8 contains the initials "B.A.," presumably standing for business agent, meaning Garthe. I find these entries to mean that Harper had contacts on these dates with Garthe concerning his recall.

In early September, about the time of these calls, Garthe contacted Dumas once again²² to see if he could get Harper recalled.²³ He told Dumas that Harper was upset because he had been laid off and not recalled and believed that he had been singled out because of his organizational activity among Stong employees. Dumas denied Harper's accusation and stated that Harper's organizational activity at Stong had nothing to do with the situation. He reviewed for Garthe, the incident that had occurred back in January at the DuPont Hotel and insisted that Harper's June layoff was simply the result of a reduction in force. He said that Harper would be recalled when work picked up.

Following the early September conversation between Garthe and Dumas, Garthe reported back to Harper what Dumas had told him. He convinced Harper temporarily to wait and not to file a grievance, then called Dumas during the second week in September to tell him that the "grievance business" was all settled and that the Union would not be grieving Harper's layoff on his behalf.²⁴ Harper's notation in

²⁰ Harper's version of this conversation is credited, Dumas' denials are not.

²¹ Contacts with the Union are noted on these dates in Harper's planner.

²² The description of the content of this conversation is a composite of the testimony of both Garthe and Dumas. Where there is a conflict, Garthe's testimony is credited over that of Dumas.

²³ Dumas denied that Garthe or anyone else had requested him to recall Harper. However, this was obviously the ultimate purpose of the call.

²⁴ Dumas' testimony that Garthe's reference to a grievance came "pretty much out of the clear blue" is not credited. Although the record discusses only one telephone call, it is more likely that there were two, the first during which Garthe obtained Dumas' version of the history of Harper's problem, the second to advise him that there would be no grievance forthcoming.

¹⁹ Harper's weekly planner notes that he spoke to Dumas on August 16 about his union activity.

his planner for Thursday, September 9, "Next to be sent out" supports the testimony of the witnesses.

From Harper's planner, it would appear that he made further calls to Garthe on September 13 and to Respondent on September 14. Nevertheless, he remained in layoff status through September 19.

Harper's entry for September 20 indicates apparent contacts with Martin, Lundak, and Garthe but does not explain whether these individuals were contacted individually on that date, met together, or participated in a conference call. A contact of some sort with Respondent was also noted that day. Harper had another contact with Garthe the following day. None of these contacts were the subject of testimony.

Despite the lack of testimony concerning Harper's contacts with the various union officials and with the Respondent on September 20 and 21, from previous and subsequent events, it would appear that these contacts concerned the following:

1. Harper's desire for reemployment with Respondent.
2. Respondent's failure to recall him following Garthe's most recent promise that it would do so.
3. Harper's decision, in the absence of recall, to pursue the matter at a higher level and perhaps file a grievance based on his removal from the DuPont Hotel job and his suspected replacement by Mecouch.
4. Garthe's belief that Harper did not have enough evidence to prove his allegation, and Harper's agreement to try to obtain the additional necessary evidence to support his grievance.

On September 24, Harper met with and obtained from Patrick MacCrory, a sworn and notarized statement concerning Harper's "Discharge for participation in Collective Bargaining." This document was clearly obtained to support Harper's allegations and any grievance which Harper might eventually file. That evening Harper spoke with Garthe²⁵ and presumably told him about getting the sworn statement from MacCrory and about the letter of complaint which he intended to send to Lundak.

On Sunday, September 26, Harper composed a five-page letter to John Lundak. In it, he accused the Union and Respondent of failing to act in good faith on his behalf, "contrary to the contract, constitution, by-laws and [his own] well being." He reviewed the entire history of his problems with Respondent, his layoff based on his union activity, the ineffective efforts of the Union to have him recalled on a permanent basis, his objections to the offering of union membership to Mecouch and other former Stong employees, and the hiring of them by Respondent while he and other employees of Respondent remained unemployed. Harper later attached to his letter to Lundak, sworn statements signed by MacCrory supporting his reasons for believing he had been laid off the previous January because of his union organizing at Stong.

On Monday, September 27, according to Harper's weekly planner notes for that day, he called Martin and told him about the letter of complaint he was sending to Lundak.

On September 28, again according to his notes, he called Lundak, apparently to advise him to expect his letter of complaint. Failing to reach Lundak, Harper evidently requested

Lundak's secretary to let him know when his letter was received. He also made calls to MacCrory and Philip Leonard, possibly to obtain more support for his case.

Probably as a result of one of his calls of the last few days, most likely the one to MacCrory, or perhaps as a result of a belated thought of his own, Harper determined to obtain a second statement from MacCrory. Later that day, September 28, he met with MacCrory and obtained from him a sworn statement entitled, "Secondary reason for discharge from DuPont site." This statement absolved him completely from any fault regarding the blowout incident. Still later, on September 28, Harper attached the two MacCrory affidavits and possibly additional documents to his letter of complaint and mailed them that date to Lundak.²⁶

On September 29 at 10 a.m., Lundak's office confirmed to Harper that his letter had been received.²⁷ He was told that Lundak was not in and would not be back until the following day. In any case, Lundak did not immediately reply to Harper, but chose to fully investigate the matter before doing so. This would take almost a month.

Toward the beginning of October, Dumas testified, business began, once again, to pick up, as it traditionally did at that time of year. Dumas determined to increase the crew size in response. Moreover, the Respondent was in the process of moving its offices from Wilmington to New Castle, Delaware, and Dumas felt that he could use some extra hands. He contacted and recalled a number of employees who had been laid off the previous spring, including Harper who was called on October 1 and told to report to the shop October 4 for a job at the Morgan Bank in Stanton, Delaware.

Although Dumas denied that the Union had requested Harper's recall, Harper assumed that his recall was the direct result of the letter he had written to Lundak. He admitted, however, that when he was called on October 1, to report on October 4, the individual who contacted him, Eddie Osienski, did not mention anything about the Union intervening on his behalf. Although Garthe eventually told Harper that he had informed Dumas about Harper's letter to Lundak, I do not believe Dumas knew about it as of October 1. He was probably told about it on or shortly after October 4.

On October 4, after reporting to the shop, Harper was sent to the jobsite at the Morgan Bank. According to the notes in his planner, he was on that job with Dave Walls, Pat Coen, and Doug Conoway. These notes indicate that Harper spoke to Walls about his problems with Respondent and that Walls told him that he "would like to help but the men are scared." Clearly, Harper was not satisfied with reemployment alone. He fully intended to pursue restitution for his earlier layoffs.

According to Dumas, within a few days of Harper's recall on October 4,²⁸ he and Harper had occasion to engage in what Dumas described as a fence-mending conversation. Dumas explained that inasmuch as he had heard the various rumors about Harper possibly bringing a lawsuit against him or Respondent, he wanted to assure Harper that there was no "bad blood" between them. According to Dumas, he told

²⁶ See Harper's planner, September 28.

²⁷ Ibid. September 29.

²⁸ Harper's planner note, dated October 5, indicates that he had seen and had said hello to Dumas on that date.

²⁵ See the entry of that date in Harper's planner.

Harper that he thought they should start with a clean sheet of paper at that point, and try to have a good working relationship between them, and that Harper agreed. The conversation ended with a handshake. I believe that by this time, Dumas had been told by Garthe about Harper's letter to Lundak.

From October 5–27, Harper continued to work at the Morgan Bank worksite without incident. On October 28, however, he was transferred to the shop where he worked directly for Dumas, sorting material.

On October 28, Lundak finally replied to Harper's letter of September 26. In it, he advised Harper that he had looked into his situation, found that he was gainfully employed by Respondent at the time, and that the facts, as presented by Harper to the Union, did not warrant further action by the Union. Lundak added that if Harper felt that his June layoff had been because of his union activity, he could file and pursue an unfair labor practice charge against the Respondent with the NLRB. On its surface, Lundak's October 28 letter would tend to indicate that Harper's recall was independent of any action on the part of the Union at Lundak's level. However, it is just as likely that Respondent and the Union determined together that offering Harper reemployment was the best way of circumventing Harper's filing of a grievance which might prove embarrassing to both the Respondent and the Union.

Harper credibly testified that he had a conversation with Dumas following his October 4 recall. He placed this conversation as occurring on November 1, while they were both working together moving the shop. Inasmuch as Harper kept a weekly planner or diary in which he entered the names of his foremen each day plus other notes, and this planner indicates that he worked at the Morgan Bank from October 4–27 with other foremen and did not work with Dumas at the shop until the period October 28 through November 3, I find the planner supports his testimony. Moreover, there is the entry for November 1: "Spoke to Harry about *problem*." Based on Harper's testimony and written entries, I find that the conversation he described occurred on November 1 as he testified and that the one described by Dumas occurred, as noted, on October 5.²⁹ It is not clear from the record, however, whether or not Harper had received Lundak's October 28 reply to his September 26 complaint by November 1, but from subsequent events, it appears as though he had not. According to Harper's version of their November 1 conversation, which I credit over that of Dumas where there are discrepancies, he spoke to Dumas about the events that occurred the previous January, his removal from the DuPont Hotel job, his previous layoff, the complaint he had written to Lundak on September 26, and how they could remedy his problem. He told Dumas that he believed that his recall was due to his filing the September 26 complaint with Lundak. According to Harper, Dumas denied this³⁰ and stated that the recall was due rather to some of Respondent's employees

who had requested Harper's recall.³¹ When Harper asked Dumas for the names of these employees, Dumas refused to supply them.

Harper testified that Dumas then said that Harper had a clean slate, that he would have a fresh start but if he pursued reparations over this issue and continued causing problems in Dumas' "Grinnell world," they would "be rolling in the streets."³² He added that he did not want to hear any more complaining either about organizing or about Harper's layoffs.³³ According to Harper, throughout the conversation, Dumas denied that Harper had been pulled out of the hotel the previous January due to his union activity and warned him, "Don't push it." Contrary to Harper's testimony on this subject, Dumas denied that the subject of Harper's union activities or layoffs ever came up during the conversation.

Following their November 1 discussion, Harper continued to work with Dumas through November 3. He worked for Dave Walls at Concord Mall on November 4 and 5. On November 8–12 he worked for George Carter either in Bridgeton, New Jersey, or at Concord Mall.

George Carter had worked for Respondent for several years up through November 1993 at which time he was classified as a foreman. Although at times he had three or four employees working for him, usually he was assisted by just one. As foreman, his job responsibilities included overseeing the job and making sure it was done. He represented his Company at job meetings. He was paid \$1.50 per hour more than the employees assigned to him but received the higher wage even when working alone. He had authority to grant overtime if the job required it and to assign specific tasks. Carter could grant permission to an employee to leave the job and go home early. He could also recommend job applicants for hire. He worked directly for Dumas and later for Greer, when Greer took Dumas' place after the latter's promotion. He frequently transmitted orders or information from his superiors to those employees working for him. Frequently, he would be called by his superiors and told to transfer journeymen or apprentices from one location to another. On completion of a job, Carter would send his assistant back to the shop. Despite his authority, Carter was a union member, covered by the contract. Despite Carter's membership in the Union, I find that Carter was a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act as of November 8.³⁴

On the morning of November 8, before Carter left for his first day of work with Harper in New Jersey, he and Dumas had a conversation in the parking lot of the shop in Wilmington. Carter, a personal friend of Harper's, had heard that there was a problem between Dumas and Harper and he decided to straighten it out "before it got out of hand." The problem, as Carter understood it at the time, concerned Respondent's management telling Harper to go onto the DuPont

²⁹ The record treats Dumas' and Harper's descriptions of their conversations with each other as widely differing versions of a single conversation. I find, however, as noted in the text, that they were describing two separate conversations which probably occurred almost a month apart.

³⁰ Dumas testified that Harper made no such assertion concerning his September 26 letter.

³¹ Dumas denied making any statement to the effect that Harper had been recalled because certain employees had requested his recall.

³² Dumas denied making this statement. Rather, he testified, he made a similar sounding statement in a harmless aside, after the two had shaken hands and that Harper had quoted the remark completely out of context.

³³ Dumas denied making this statement.

³⁴ *Debber Electric*, 313 NLRB 1094 (1994).

job at the hotel back in late 1992 and January 1993 and organize Stong's employees, then when he did so, Respondent, at the request of the Union, replaced Harper, a journeyman, with Steve Mecouch, an apprentice, laid off by Stong because of his union activity.

The conversation began when Carter asked Dumas what his problem was with Harper. Dumas, according to Carter, mentioned something about Harper's involvement in union activities on the DuPont job. He stated that he knew that Harper had once filed a lawsuit against a previous employer of his, Wayman Fire Protection,³⁵ and if he brought a lawsuit against Grinnell Fire Protection, he "would never, no longer work" for Respondent. He explained further that he had heard that Harper was going to bring charges against Grinnell because Mecouch had been hired in his place but that if he did so, he would no longer work for Grinnell, ever. He directed Carter to tell Harper this.

Dumas admitted to having a conversation with Carter on or about November 8 at the shop during which Carter asked Dumas what was going on between him and Harper. Carter reported that Harper felt as though he "was being screwed around" by Dumas and Grinnell and that Dumas did not like him. Dumas testified that he told Carter that that was not the case, that he and Harper had had a conversation a week or two earlier and everything seemed fine.

At that point, according to Dumas, Carter said that Harper was running around threatening some kind of lawsuit. Dumas asked rhetorically what Harper had to gain by a lawsuit since he was then working for Respondent and everything that Harper felt was wrong between them had been cleared up. Dumas denied saying to Carter during this conversation, or at any other time, that if Harper brought a lawsuit against Grinnell, he would never work for Grinnell again. Where Carter's version of this conversation differs from that of Dumas, I credit Carter.

Later that day, while in the truck, on the way to their job in New Jersey, Harper told Carter about his November 1 conversation with Dumas wherein Dumas had told him that his slate had been wiped clean and he had a fresh start. He asked Carter if he should take Dumas' word for it or consider the option that his business manager had recommended, i.e., going to the NLRB. At this point, Carter told Harper what Dumas had instructed him to tell him, namely, that if he brought charges against the Company, he would never work for Grinnell again. When told this, Harper appeared to Carter to be upset, but did not state whether or not he intended to bring a lawsuit.

On Friday, November 12, Carter told Harper to report to the shop. When he arrived at the shop about 3:30 p.m., Dumas advised him that he was being laid off for lack of work. Also being laid off were George Snyder, a foreman who was intending to go into business for himself; Bob Bradley, a journeyman whose name does not appear on previous employee lists and who probably was a new employee; William Preston, a journeyman, also probably a new employee, laid off November 5; and Steven Mecouch, the apprentice whose hiring was so objectionable to Harper.

³⁵ The Wayman case was an unemployment compensation case involving that employer and the layoff of Harper, Carter, and its other employees.

Dumas testified that the layoffs of November 1993 were once again the result of a lack of available work which traditionally occurs around Thanksgiving time following the annual increase each October. The number of core employees retained was 19, a number comparable to the number of retentions during previous layoffs.

When Dumas advised Harper of his layoff on November 12, a brief conversation ensued. Dumas told Harper that the reason he was being laid off was lack of work and there was nothing he could do about it. Harper said that if that was the reason, it was fine and he did not mind, but he should not be laid off for engaging in union activities.

Dumas then flashed Mecouch's check in front of Harper, indicating that he too had been laid off. Harper told Dumas that he too had been laid off. Harper told Dumas that he did not have to pacify him and repeated that he did not mind being laid off due to lack of work but did mind being laid off due to his participation in union activity. Dumas again assured Harper that union activity was not the reason for his layoff.

As of November 12, Dumas was aware that he had been promoted, was leaving, and that he was being replaced as superintendent. He testified that toward the end of his conversation with Harper, he told him that there were going to be some changes made at Grinnell and that if Harper wanted, he would put in a good word for him with the new superintendent. He also offered to supply him with a reference if he intended to apply for work with other companies. Harper denied that Dumas made any such offers.

Where Dumas' version of his November 12 conversation with Harper is contrary to that of Harper, I credit Dumas. I believe that Dumas tried to placate Harper and to convince him that his layoff was due to a lack of work. It was in Dumas' and Respondent's own self-interest to convince Harper that his layoff was economically motivated in order to keep him from filing a grievance with the Union or charges with the Board. For this reason, he would offer assurances to Harper and show him that Mecouch and others had also been laid off. As of November 12, Harper had not taken any action against Respondent and did not immediately do so on his being laid off. Thus, it would appear that Harper was satisfied, at least for the time being, that his November 12 layoff was not unlawfully motivated.

On November 16, Dumas was promoted and moved to Philadelphia and Greer became superintendent in his place. Thereafter, Greer became responsible for the personnel decisions which had previously been the responsibility of Dumas.

Several days after succeeding Dumas as superintendent, Greer³⁶ had a conversation with Harry Gravell. He told Gravell that in his opinion Harper had gotten "screwed" and he wanted to hire him back. He asked Gravell if he was going to the union meeting which had been scheduled for the Thursday evening after Thanksgiving and, if so, to tell Harper that Greer wanted to rehire him.

On November 22, Harper filed his charge against Respondent alleging that the Respondent had laid him off on June 9 because of his union activities. He had named James Schwander in the charge as the employer representative and

³⁶ It was stipulated that Greer was, at all relevant times, a supervisor and an agent of Respondent within the meaning of the Act and I so find.

Schwander finally received a copy of the charge on November 29.

On receiving a copy of the charge, Schwander testified, he immediately called his superior, the district general manager, Jim Pozzi, who instructed him to fax a copy of the charge to himself and to send the original, Federal Express, to the legal department in New Hampshire. Thereafter, according to Schwander, the matter was out of his hands.

George Carter testified that one morning³⁷ about 7 a.m. he was waiting to speak to Greer before going out on the road. He was standing just outside of Greer's office when Schwander and Greer arrived together and entered Greer's office. They had a roll of blueprints and were discussing a job. While Carter continued to wait outside, he could partially overhear the conversation going on between them. According to Carter, he heard Schwander in a loud voice, with a harsh tone, state that Jesse Harper would "no longer, ever work there." Carter testified that he could not hear what the conversation was about before Schwander "blew up" and started yelling about Jesse Harper but that it had something to do with a job that was going on at the time. Carter said that he could not hear what Greer was saying.

With regard to the conversation between Schwander and Greer overheard by Carter, Schwander testified that he could not recall talking to Greer about the charge, that after receiving the charge and forwarding it as instructed, it became a corporate matter and was out of his hands. He specifically denied making the statement attributed to him by Carter, that Jesse Harper would never work at Grinnell again. He said that he could not recall yelling during a conversation with Greer about Harper. Greer did not testify.

With regard to this conversation between Schwander and Greer, overheard by Carter, I credit Carter. I find that Greer was attempting to rehire Harper but that Schwander refused to permit him to do so because Harper had filed the charge on November 22.

Carter testified that Greer came out to the jobsite on the afternoon of the day that Schwander made the statement that Harper would never work for Grinnell again. He asked Greer why Schwander had been upset that morning. Greer explained that Schwander was really "pissed off" because he had been served with papers concerning a suit filed by Harper, referring, of course, to the charge he had filed November 22. Greer, himself, appeared upset as well, and explained the history of Harper's union activity on the DuPont job, acting at the behest of Grinnell and the Union, and Harper's removal from that job and the role he, Walls, and others, had played while employed on that job. Greer was concerned, according to Carter, that his involvement might result in his getting sued himself.

Sometime after their first conversation about rehiring Harper, and after Harper filed the charge, Gravell met and had a second conversation with Greer. Gravell told Greer that he had seen Harper at the union meeting, told him that Greer wanted him to come back, and that Harper had accepted Greer's offer. He told Greer that Harper would call him about coming back to work for Respondent.

³⁷ The examining attorney mistakenly supplied the date, November 29 as the day that this incident occurred. I find, however, that it occurred on November 30 or later because Schwander did not receive a copy of the charge until the mail was delivered on November 29.

On hearing from Gravell that Harper intended to return to work for Respondent, Greer informed Gravell that he was not allowed to rehire Harper and that Harper would never work for Grinnell again. He identified Schwander as having made this decision but did not state that it was because Harper had filed charges.

Following Respondent's refusal to reemploy Harper, Harper went forward with arrangements with the Board to have his charge processed. On December 6, he also filed with Lundak a grievance against Respondent based on his January 6 layoff at Raychem, his June 8 layoff from Grinnell, and his termination on November 12. He noted on the grievance form that these layoffs and final termination were the result of his participation in union activity. He also attached a three-page letter to his grievance describing the history of his problems with Respondent. The settlement he desired was "full pay for lost time due to being replaced by apprentice Steve Mecouch"³⁸ and "Gainful employee [sic] for Grinnell without reprisals." The theory of Harper's grievance was that the agreement between Respondent and the Union to hire Stong's laid-off employees at the expense of Respondent's union employees was illegal,³⁹ particularly the hiring and retaining of Mecouch at Harper's expense.

On December 23, Harper filed an amended charge which added the November 12 permanent layoff to the allegation contained in the earlier charge.

Schwander testified that in January or February 1994⁴⁰ he had a conversation with Greer wherein Greer suggested that Respondent bring Harper back to work, if it would help the charge go away. Schwander told Greer that he did not think that would be a good idea because it would lead to further problems. He felt that he could not justify putting Harper to work when Respondent did not have the work, hoping thereby to have the charge go away. According to Schwander, Greer was in charge of the construction forces in the field and it was his decision to rehire or not to rehire Harper. Although Schwander testified that he felt that to hire Harper back, just to make the charge go away, when there was no work, would not be correct and to do so would make it appear as though Respondent were trying to pacify Harper, he testified further, that Greer, nevertheless, could have done so if he wanted to reemploy Harper.

Despite Schwander's testimony that he would have loved to bring Harper back but for the fact that "we didn't have the work," elsewhere he testified that Respondent "may have had to have called people back." This would probably have been after March 15 when the complaint issued and also after April 13, when the Union went on strike and Respondent offered employment to and hired striker replacements. Gravell also testified that Respondent hired a few people between November 1993 and April 1994 and also rehired Mecouch although the record does not mention a date. Harper confirmed that Mecouch had been recalled by Respondent but he, himself, had not. He testified that since his permanent layoff from Respondent, he had been seeking employment but had not been successful until about 3 weeks

³⁸ Spelled McCooch on the grievance form.

³⁹ More specifically, Harper argued that the agreement to hire Stong's employees did not fit the established apprentice/journeyman ratio and the rule that Respondent could not hire an apprentice to replace a journeyman.

⁴⁰ Hereinafter, all dates are in 1994 unless otherwise noted.

before the hearing when he was hired by Security Fire Protection.

The record indicates that Respondent hired Randy Steve, a sprinkler fitter, in early December and offered Brian Gravell, Harry Gravell's brother, employment which he refused. After April 13, Respondent hired a large number of replacements but made no offer to Harper. It is clear that there was work available for Harper and that lack of work was not the reason for Respondent's failure to offer him re-employment.

Conclusions

The record is clear that Harper was active among Grinnell's employees in their campaign to organize Stong. It is also clear that he was more active than some Grinnell employees and less active than others. Grinnell's management, however, was initially in favor of this activity and took no action to interfere in its employees' participation.

When Harper's organizing activity came to the attention of Stong's management, then to DuPont's management and DuPont complained to Dumas about this activity, Dumas became concerned at the possibility of Respondent's losing DuPont as a customer. The denials of Dumas and some other management personnel of Stong and DuPont notwithstanding, I find that Harper was identified to Dumas as the Grinnell employee who had spoken to Bowersox and he, in turn, thereafter admitted this fact to Gravell. Indeed, it is clear that Bowersox identified "Jesse" as the Grinnell union activist to Forshey and he stated he "would take care of it." Then Forshey reported the problem to Yankalunas, and he promised to make a phone call and "get this thing squared away." Then Forshey named Jesse to Stepchuck who promised "to take care" of the problem by calling Dumas. Then Stepchuck called Dumas about the problem. It is absurd, in my opinion, to believe that, knowing the identity of the "troublemaker" to be "Jesse," Stepchuck did not pass it on to Dumas. It is ridiculous to believe that every member of the Stong and DuPont management teams, who was involved with the problem, including Stepchuck, promised to take care of the problem, and knew the problem was Jesse Harper, yet Stepchuck failed to identify Harper by name when he called Dumas to complain specifically about his activity. Stepchuck, who knew Harper was the problem, must have identified him as such to Dumas so that he could "take care of it."

After Dumas was made aware that DuPont was unhappy with Harper's organizing efforts among the Stong employees and wanted "the situation corrected," Dumas considered transferring Harper off the DuPont job. Since that job was winding down anyway, however, he apparently determined that he would simply warn his employees, including Harper, not to engage in organizing Stong's employees on working time and to stay in their own area, then later transfer Harper when the DuPont job was completed. He followed through on this plan by issuing an order to this effect and by having Walls issue a similar order. Walls' order to Harper to stay in his own area and to refrain from talking to Stong's other trades was also a result of his discussion with Frawnapple. Meanwhile, Dumas advised Gravell of his intention of possibly having to transfer Harper because of the complaint from DuPont.

After warnings were issued to Harper about continuing his organizing activity among Stong's employees, however, the

blowout occurred between him and MacCrory at lunchtime on January 4. The blowout was reported back to Dumas, probably by Greer. Dumas received the mistaken impression that Harper was still engaging in union activity among Stong's employees, contrary to his order. He contacted Walls immediately, that afternoon, after failing to reach Harper, and told Walls he was transferring Harper to another job. Although Dumas denied that he removed Harper because of the blowout, I find that he did so because he believed it to be a continuation of Harper's union activity in contravention of his direct order to refrain from campaigning to unionize Stong's employees. Clearly, Dumas felt that he could not take the risk of angering DuPont by keeping Harper on the job, if he insisted on engaging in that activity which he had specifically prohibited.

My conclusion that Harper was removed from the DuPont job for the above reasons, rather than because work was running out, is based on Harper's credited testimony that Dumas told him specifically that he was being transferred because of the blowout. I find Harper's testimony supported by the fact that Greer was never called by Respondent to testify concerning his discussion with Dumas about the blowout; the fact that Harper was abruptly removed from the DuPont job as soon as he could be reached; and the fact that Gravell replaced Harper on the DuPont job thus indicating clearly that Harper had not been removed for lack of work.

It is important to note that Harper was not removed from the DuPont Hotel worksite simply because he was a union member or because he was a union activist. This is obvious because Respondent was already unionized and was actively, though not openly, supporting the union campaign to organize Stong. Moreover, other employees of Respondent besides Harper were engaged in the Stong campaign and were not removed from the job for that reason. On the contrary, Harry Gravell, the prime mover among Respondent's employees, in the Stong organizational drive, the man who set up meetings and from whom Stong's employees sought information most frequently about the Union, was the very person whom Dumas assigned to fill Harper's position at the DuPont Hotel after Harper was removed. For these reasons, I conclude that Harper's removal was occasioned not merely because he was active on behalf of the Union during the Stong organizational campaign but rather for some additional reason or reasons. Those reasons, I find to be his specific identification by Stong, then DuPont as a union activist in the campaign to organize Stong's employees; DuPont's request to Dumas to correct the situation; Dumas' effort to correct the situation by ordering Respondent's employees to refrain from certain organizational activity; the blowout; and finally, Dumas' mistaken belief that the blowout was the direct result of Harper's continuing efforts to organize Stong's employees in deliberate contravention of Dumas' explicit order. Since Dumas' concern was not Harper's activity per se, but rather the possible loss of DuPont as a customer, he did not discharge or permanently lay off Harper but transferred him to another job, away from the worksite where Stong's employees were employed.

I have found that Harper's job at Raychem, which lasted only 2 days, terminated for legitimate reasons. Harper, however, was convinced that his unemployment was the direct result of his organizing efforts among the Stong employees, the blowout, and the hiring of Stong's employees, particu-

larly Mecouch, while he remained in layoff status. He brought his concerns to the attention of Garthe and advised him that he was considering filing a grievance.

Although Garthe dissuaded Harper from filing a grievance at this time, with the explanation that there were not enough facts to support his case, there appears to have been other considerations which may well have determined the inadvisability of filing and supporting Harper's proposed grievance. Thus, the Union and Respondent were allies in the campaign to organize Stong's employees, a campaign which was in full swing at the time. To show Respondent's support for the organizational drive, the Union had requested and Respondent had agreed to hire Stong's terminated employees. Obviously, the Union was in no position to support Harper's grievance, the object of which was to have him recalled to replace the Stong employees hired by Respondent at the Union's request. At the same time, Garthe and the Union had an obligation to try to have Harper recalled after his removal from the DuPont Hotel job for engaging in organizational activities.

I find that Garthe did, in fact, follow through on his promise to contact Dumas to have Harper recalled. I also find it more probable than not, that in the course of his discussions with Dumas, that he advised him of Harper's intention to file a grievance based on his removal from the DuPont Hotel job and his objections to the hiring of Stong's employees, in particular Mecouch.

When Dumas recalled Harper on February 22, I find that he did so, not only because he needed more manpower, but also because Garthe had contacted him, asked him to recall Harper and advised him of Harper's possibly filing a grievance if not recalled.

When Harper reported for work on the morning of February 22, the conversation as credibly described by Harper and denied by Dumas occurred. I find it more probable that it took place, rather than it did not, for several related interdependent reasons. First, because on the evening of January 4, Dumas told Harper that he had heard that Harper had had a big blowout with a Stong employee in violation of his "no-talking" order and was therefore removing Harper from the DuPont jobsite; second, because Dumas had been told by Garthe that Harper might file a grievance based on his removal from the DuPont Hotel job on these grounds; third, because, as Harper quoted him, he did not want to hear another word about it. In other words, Harper had been recalled, at least in part, to avoid a grievance, and the subject matter of the grievance, Harper's removal from the DuPont Hotel job, was brought up by Dumas as a means of telling Harper that although he was being recalled by Dumas, he still did not want Harper to get similarly involved again. By recalling Harper and lecturing him concerning his activities among the Stong employees, Dumas clearly expected that he had put the problem to rest.

Harper worked for Respondent from February 22 into early May without incident. True to his word, Harper did not get further involved in the organizational drive at Stong. When Greer told him that there was going to be a layoff, but that Harper was safe due to political considerations within the Union; then, there was, indeed, a layoff, with Harper spared as Greer forecasted, it is apparent that Greer was privy, in advance, to the layoff and the reason, perhaps, why Harper was retained. But even if Harper's testimony concerning his conversation with Greer is not credited, it is still pos-

sible that Harper was kept after the other employees had been laid off, in order to avoid Harper's filing of the threatened grievance.

Of course, if Greer's internal union political explanation and Harper's potential threat to file a grievance are rejected as the reasons for retaining Harper while laying off eight other employees, then his retention under the circumstances is supportive of Respondent's position that he was retained because Dumas harbored no animosity toward him at the time.

The circumstances leading up to and surrounding the layoff of Harper on June 8 do not appear to be particularly suspicious. Three employees were laid off on that day and the names of four laid-off employees, including that of Harper, were given to another company to hire, thus indicating that the layoff was not expected to be temporary. Kept on the payroll were 18 employees, including Dumas, virtually all⁴¹ of whom, had been employed by Respondent over the years. This layoff left Respondent with the smallest complement of employees since the layoff of February 1990. Company records thus support Respondent's defense that available work could not generally support the retention of the laid-off employees. In light of all of the facts, the company records, the layoff of a total of 11 employees, including Harper, in May and June, 8 of them preceding Harper's, the retention of the smallest complement of employees by Respondent in several years, the length of Harper's retention on the job between February and June with no additional incidents or further evidence of animosity toward him during this period, I find insufficient evidence to conclude that Harper's June 8-9 layoff was discriminatorily motivated and therefore recommended dismissal of that allegation.

When Harper later sought to file a grievance with Garthe based on the theory that his January 6 and June 8 layoffs were both in retaliation for his union activity at Stong, and Garthe dissuaded him from doing so with the promise that he would talk to Dumas about it, Harper effectively gave notice that he was still considering seeking restitution for the wrongs he felt he had suffered at the hands of Dumas. When Garthe advised Dumas that Harper was considering filing a grievance, and told him the basis for his grievance, Dumas was also put on notice that the problem that he had thought had been put to rest on February 22, was still very much alive.

When Dumas met Harper in front of the shop on August 16, 1993, and Harper asked to be recalled, and Dumas told Harper that he "was on example of how you can lose that good paying union job for participating in union activity," I find that Dumas was admitting, once again, that Harper had initially been removed from the DuPont Hotel job because of his insisting on continuing his union activity despite being told to cease.⁴² By stating that "the horse was out of the barn"⁴³ and that there was nothing he could do to help Harper, I find that he was telling Harper that it was too late

⁴¹ Mecouch was retained, probably by agreement with the Union to retain employees previously employed by Stong.

⁴² I do not agree with the General Counsel that by making these statements, Dumas was admitting that the June 8 layoff was unlawfully motivated.

⁴³ "When the horse has been stolen, the fool shuts the stable." John Bartlett, *Familiar Quotations* (14th ed. 1968), p. 183 b, fn. 5. Citing *Les Proverbes del Vilain* [c. 1303].

for him to change the course of events, that by taking the position that he would fight Dumas on the issue, through the filing of grievances or by pursuing litigation, he had closed the door to recall. By Dumas making these statements to Harper, I find Respondent violated Section 8(a)(1) of the Act.⁴⁴

Despite Dumas advising Harper on August 16 that it was too late for him to help Harper, Harper persisted through late August and September in his attempt to get the Union to support his efforts to obtain reemployment with Respondent. His efforts were successful to the extent that Garthe interceded on his behalf, and despite Dumas' earlier statements to Harper on August 16, about it being too late, Garthe obtained Dumas' promise to reemploy Harper when work picked up. This occurred on October 4.

With regard to the November 1 conversation between Dumas and Harper, I find that Respondent, through Dumas, violated Section 8(a)(1) of the Act, by Dumas' telling Harper that if he pursued reparations over the issue of his layoffs and continued causing problems for Dumas by doing so, they would be rolling in the streets.⁴⁵ Similarly, by telling him that he did not want to hear any more complaining either about his organizing or his layoffs; and by telling Harper, "Don't push it," Respondent, through Dumas, again violated Section 8(a)(1) of the Act.

On November 8, I have found, Carter was Harper's supervisor and by virtue of this fact, he was also Respondent's agent. On that date, when Dumas told Carter to tell Harper that if he brought a lawsuit or charges against Respondent, he would no longer, ever, work for Grinnell, Dumas made Carter Respondent's agent for the specific purpose of committing an 8(a)(1) violation of the Act. Later that day, when Carter advised Harper of Dumas' threat, he thereby committed the 8(a)(1) violation on Respondent's behalf as alleged in the complaint.⁴⁶

On November 12, when Harper was laid off, he was one of five employees let go about that time, a group which included Mecouch. Employees retained were almost all core employees of longstanding. Dumas went out of his way to convince Harper that the layoff was economically, not unlawfully, motivated and even showed him Mecouch's separation check. No words of animus passed between Dumas and Harper at the time and since Harper had not filed any grievances or charges against Respondent prior to his layoff, there is no basis for a finding that Respondent had reason to effectuate its threat of November 8. I find that there is insufficient evidence to support the allegation that Harper was laid off on November 12 for reasons violative of the Act.

When Greer took over for Dumas on November 16, he was fully aware of the history of Harper's problem with Respondent dating all the way back to his organizational work among the Stong employees. He was sympathetic with Harper's case and decided to undue the injustice Harper had suffered by rehiring him, the authority to hire, just having recently been acquired by him, as a result of his appointment to superintendent to replace Dumas.

However, between the time that Greer told Harry Gravell to advise Harper of his decision to rehire Harper and Harper's acceptance of Greer's offer of reemployment, as later reported by Gravell to Greer, Harper, on November 22, filed his charge with the NLRB alleging that he had been laid off on June 9 because of his union activities. When Schwander received a copy of Harper's charge on November 29, he vetoed Greer's decision to rehire him. Evidence of Schwander's refusal to permit Greer to rehire Harper is contained in Carter's description of the conversation between Schwander and Greer which Carter overheard on or about November 30, and his testimony concerning Greer's clarification of that conversation which he offered to Carter that afternoon. Further supporting evidence is contained in Gravell's testimony concerning his later conversation with Greer who informed him that he was not allowed to rehire Harper and that Harper would never work for Grinnell again, by Schwander's order.

Although I have found that the General Counsel has failed to prove by a preponderance of the evidence that Harper was laid off of November 12 for reasons violative of the Act, I find that the evidence clearly supports a finding that he was denied immediate employment as well as any possible future employment with Respondent on or about November 30, shortly after his November 12 layoff, because he engaged in union activity, filed charges, complained about working conditions, sought reparations, threatened grievances, and pursued his rights under Section 7 of the Act. I thus find Respondent in violation of Section 8(a)(1) and (3) of the Act.⁴⁷

The record clearly reflects that Greer was in the process of rehiring Harper in November 1993. But for the fact that Schwander vetoed Greer's decision to rehire Harper, *solely* because he engaged in union activity, filed charges, and pursued his rights under Section 7 of the Act, Harper would have been reemployed by Respondent. The dictates of *Wright Line*⁴⁸ are met.

CONCLUSIONS OF LAW

1. Respondent Grinnell Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling an employee that he would not be recalled from layoff because he had engaged in union activities, by threatening an employee with retaliation if he pursued reparations for previous layoffs of filed grievances, and by prohibiting and otherwise interfering with these protected activities, Respondent violated Section 8(a)(1) of the Act.

4. By telling an employee that if he filed charges with the Board against Respondent, he would no longer, ever, work for Grinnell, Respondent violated Section 8(a)(1) of the Act.

5. By refusing Jesse N. Harper immediate employment as well as any possible future employment with Respondent be-

⁴⁴ *Grinnell Fire Protection Systems Co.*, 307 NLRB 1452, 1454 (1992).

⁴⁵ *W. F. Bolin Co.*, 311 NLRB 1118 (1993).

⁴⁶ *Helnick Corp.*, 301 NLRB 128, 133 (1991); *Debber*, 313 NLRB 1094 (1994).

⁴⁷ *W. F. Bolin*, supra.

The factual background on which I base my finding of a violation includes the factual background upon which the allegations contained in the complaint are based as well as the subsequent events described herein. All factual issues were fully examined, considered, and litigated at the hearing, thus permitting the finding of the 8(a)(3) violation.

⁴⁸ 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

cause he engaged in union activity, filed charges, and pursued his rights under Section 7 of the Act, Respondent violated Section 8(a)(1) and (3) of the Act.

6. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take appropriate and affirmative action designed to effectuate the policies of the Act. In particular, as I have found that employee Jesse N. Harper was denied immediate employment as well as any possible future employment with Respondent because he engaged in union activity, filed charges, and pursued his rights under Section 7 of the Act, in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that Respondent be ordered to offer Harper immediate and full employment to the job for which he was being considered at the time of the unlawful refusal to employ him, displacing, if necessary, and replacement or, if the job for which he as being considered no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of pay suffered as a result of the discrimination against him with backpay computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Isis Plumbing Co.*, 138 NLRB 716 (1962). I shall also recommend that Respondent be required to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁹

ORDER

The Respondent, Grinnell Corporation, Wilmington, Delaware, its officers, agents, successors, and assigns, shall

1. Cease and desist from discouraging membership in, activities on behalf of, or sympathies toward Road Sprinkler Fitters Local Union No. 669 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada or any other labor organization by

(a) Telling employees that they will not be recalled from layoff because they had engaged in union activities.

(b) Threatening employees with retaliation if they pursue reparations for previous layoffs or file grievances.

(c) Telling employees that if they file charges with the Board, they will no longer, ever, work for Grinnell.

(d) Refusing Jesse N. Harper immediate employment as well as any possible future employment with Respondent because he has engaged in union activities, filed charges, and pursued his rights under Section 7 of the Act.

⁴⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Jesse N. Harper immediate and full employment to the job for which he was being considered at the time of the unlawful refusal to employ him, displacing, if necessary, any replacement or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

(b) Make Jesse N. Harper whole for any loss of pay suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in New Castle, Delaware, copies of the attached notice marked "Appendix."⁵⁰ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁵⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT tell employees that they will not be recalled from layoff because they have engaged in union activities.

WE WILL NOT threaten employees with retaliation if they pursue reparations for previous layoffs or file grievances.

WE WILL NOT tell employees that if they file charges with the Board, they will no longer, ever, work for Grinnell.

WE WILL NOT refuse Jesse N. Harper immediate or future employment because he has engaged in union activities, filed charges, or pursued his rights under Section 7 of the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Jesse N. Harper immediate and full employment to the job for which he was being considered at the time of our unlawful refusal to employ him or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privi-

leges previously enjoyed and WE WILL make him whole for any loss of pay suffered as a result of the discrimination against him.

GRINNELL CORPORATION